This decision was affirmed by the Deputy General Counsel (Fiscal), Department of Defense, on April 4, 2001.

January 11, 1999

In Re:

[Redacted]

Claimant

Claims Case No. 98112018

CLAIMS APPEALS BOARD DECISION

DIGEST

Following reassignment, an employee's pay should have remained at the same level, but was erroneously raised a step. The erroneous increase was noted on a Notification of Personnel Action which the employee received. The overpayments continued for almost six years. Waiver under 5 U. S.C. § 5584 is precluded because the employee had notice of the error and did not bring it to the attention of the proper authorities.

DECISION

This is in response to an appeal of DOHA Settlement Certificate, DOHA Claim No. 98061513, July 28, 1998, which denied the request of an employee for waiver of a debt which arose when her pay level was erroneously raised one step following her reassignment.

Background

The employee was a GS-11, step 3, when she was reassigned in November 1990. Although the reassignment should have had no effect on her pay level, she was erroneously raised to a GS-11, step 4, on a Notification of Personnel Action (SF-50) she received. Because of this error, she was overpaid in the amount of $5,972.96 between November 8, 1990, and September 28, 1996. Credits reduced the overpayments to $5,060.58. Waiver was denied in our Settlement Certificate, and the employee appeals that denial through her husband. She points out that this was the third SF-50 that she had received concerning the reassignment, the first two having been unrelated to her salary. She states that she did not review the SF-50s because she expected her grade and step level to remain the same. She indicates that she was unaware that her pay had increased because her husband controlled the joint account into which the check was deposited. She argues that she should not be penalized for the error of the Defense Finance and Accounting Service

(DFAS), which continued for almost six years.[(1)]

Discussion

Under 5 U.S.C. § 5584, we have the authority to waive collection of overpayments of pay and allowances if collection would be against equity and good conscience and not in the best interest of the United States and if there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the employee. The standard we use to determine fault is whether a reasonable person knew or should have known that she was receiving payments in excess of her entitlements. *See* 4 C.F.R. part 91. Our decisions and those of the Comptroller General indicate that waiver is not appropriate when an employee has records which would indicate an overpayment and fails to review such documents for accuracy or otherwise fails to take corrective action. *See* DOHA Claims Case No. 98081701 (August 21, 1998), and *Donald R. Kremer,* B-231924, Oct. 24, 1989. The employee does not acquire title to the excess payment merely because an administrative error occurred and has a duty to return the excess amount when asked to do so.[(2)] *See Master Sergeant Haywood A. Helms, USAF,* B-190565, Mar. 22, 1978.

In the case before us, the employee received an SF-50 which indicated that her pay had erroneously been raised by one step. Although she had a duty to review her SF-50s for accuracy, she states that she did not review them because she expected her pay level to remain the same.[(3)] Our decisions and those of the Comptroller General have repeatedly stressed the importance of an employee's review of the documents he receives to prevent errors such as the one which occurred here. While it is unfortunate that the employee was overpaid for almost six years, she is partially at fault for the continuation of the error because she had information which could have ended the overpayments at the beginning of the period in question. Since she is partially at fault, waiver is not appropriate. *See* DOHA Claims Case No. 98081701, *supra; Donald R. Kremer,* B-231924, *supra;* and *L. Mitchell Dick,* B-192283, Nov. 15, 1978. Administrative error, which is generally an element of erroneous payment cases, does not remove the employee's fault.

The employee states that she was unaware of the overpayments because her paychecks were deposited in a joint checking account which her husband managed. As discussed above, the standard we employ to determine fault is whether a reasonable person would be aware that she was being overpaid. It is our view, as it was the Comptroller General's, that a reasonable person would have reviewed her leave and earnings statements and been aware of a change in the amount that was going into a checking account on her behalf, particularly at the time of a job reassignment. *See Charles J. Zeman,* B-199802, Nov. 28, 1980; and *Simon B. Guedea,* B-189385, Aug. 10, 1977. The fact that her husband maintained the joint account does not relieve her of the responsibility to review statements provided to her.

The employee argues that she should not be penalized for DFAS's error. When an employee receives payments which she knows or ought to know are in excess of her entitlement, she does not acquire title to the excess amounts and has a duty to return them when asked to do so. *See* DOHA Claims Case No. 98040117 (July 8, 1998). We do not view collection of overpayments in such a situation as a penalty. Moreover, we point out that the employee should not receive a windfall due to DFAS's error, as would be the case if she were allowed to retain the overpayments, particularly since she had been provided documents which could have prevented the overpayments or held them to a minimum.

The employee points to the degree of error attributable to DFAS, the fact that the overpayments continued for almost six years. We point out that waiver is an equitable remedy and therefore depends on the facts of the case at hand. Equity is not available to a party who is in any way at fault. Since in this case the employee is partly at fault for continuation of the error, waiver is precluded. *See James A. Moule,* B-253967, Nov. 30, 1993.

While the employee expresses doubt as to whether consideration of her waiver request under 5 U.S.C. § 5584 was proper, we point out that it is entirely proper. Overpayments to civilian employees have been considered under that statute since it was enacted in 1968. *See* Pub. L. No. 90-616 § 1(a), 82 Stat. 1212 (1968). Prior to the enactment of that statute, employees who were overpaid had more limited recourse. We are aware of no other statute under which waiver of the employee's debt could be considered. (Waiver requests of members of the Uniformed Services and National Guard are considered under separate statutes, but the standards for waiver are similar. *See* Standards for Waiver, 4 C.F.R. Part 91.)

The employee also expresses doubt that the waiver statute was intended to deny waiver to a person in her situation. The legislative history of Pub. L. No. 90-616 does not bear out the employee's comments regarding the purpose of the statute. *See* S. Rep. 1607, 90th Cong., 2d Sess., (1968), *reprinted in* 1968 U.S.C.C.A.N. 4398. Moreover, we note that at the time of the enactment of the waiver statute Congress directed the Comptroller General to prescribe standards for waiver. In response, the Comptroller General promulgated the Standards for Waiver, 4 C.F.R. Part 91, which therefore have the force and effect of law. Because the employee was partially at fault, denial of her waiver request is clearly consistent with those standards. The Standards are deemed to be in accordance with Congressional intent since Congress has made no attempt to modify them. *See* B-201706, Mar. 17, 1981.

The employee objects to repayment of the portion of the overpayment which was withheld for taxes. This Office and the Comptroller General have always held that an employee's debt is the gross amount of the overpayment including amounts withheld for taxes, because such amounts are paid to the appropriate agencies on her behalf. An individual's income tax liability is under the jurisdiction of the Internal Revenue Service and the appropriate state authorities. The employee should contact those agencies after the debt is repaid. *See* DOHA Claims Case No. 98040116 (July 8, 1998); *Amadeo Martinez, Jr,* B-261628, June 13, 1996.

Conclusion

We affirm the Settlement Certificate.

_/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_/s/_____

Christine M. Kopocis

Member, Claims Appeals Board

_/s/_____

Jean E. Smallin

Member, Claims Appeals Board

1. This Office has the authority to render a waiver decision regarding the employee's debt. We are unable to comment on DFAS's administrative procedures. If the employee wishes to pursue the questions she asks regarding those procedures, she should address those questions to DFAS.

2. Through her husband the employee argues that an error of the magnitude of the present case is not administrative error, since she views administrative error as indicative of a minor mistake. We point out that an administrative error can be of any magnitude, since the term merely indicates that the mistake originated with the government agency involved rather than the employee.

3. In our view, the fact that she received multiple SF-50s should have given her increased incentive to review the information contained thereon in order to determine the cause of the multiple forms.